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IN THE SUPREME COURT OF THE STATE OF UTAH

T. VAL CHRISTIANSEN,)

Plaintiff-Appellant,)

vs.)

Case No. 15751

UTAH-IDAHO SUGAR COMPANY,)

a corporation, and UNION)

PACIFIC RAILROAD, a)

corporation,)

Defendants-Respondents. :

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal from the Summary Judgment of the
Fourth District Court for Utah County
Honorable J. Robert Bullock

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STATEMENT OF POINTS

POINT I - Plaintiff-Appellant's Cause of Action is barred by the statute of limitations because it is for a liability created by the statutes of this state, and the three-year statute of limitations set forth in Section 78-12-26, Utah Code Annotated, 1953, as amended, applies.

POINT II - Even if the Six-year statute of limitations applies, Plaintiff-Appellant's cause of action is barred because more than six years expired between the date any cause of action accrued in the Plaintiff-Appellant and the date the action thereon was commenced.

POINT III - The Fourth District Court properly dismissed the action as Plaintiff was never evicted.

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Plaintiff-Appellant,)	
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vs.)	Case No. 15751
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UTAH-IDAHO SUGAR COMPANY,)	
a corporation, and UNION	:	
PACIFIC RAILROAD, a)	
corporation,	:	
)	
Defendants-Respondents.	:	

NATURE OF THE CASE

This was an action for damages for the alleged breach of the covenants under a Special Warranty Deed.

DISPOSITION IN DISTRICT COURT

The Defendant-Respondent Utah-Idaho Sugar Company (hereafter referred to as Defendant-Respondent) moved to dismiss the action. This Motion to Dismiss was treated as a Motion for Summary Judgment of No Cause of Action. The District Court granted said Motion, and Plaintiff-Appellant appealed the judgment of the District Court.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent seeks affirmance of the judgment of the District Court.

STATEMENT OF FACTS

On or about June 8, 1945, the Plaintiff-Appellant purchased from the Defendant-Respondent a parcel of real property situated in Utah County, State of Utah, by Special Warranty Deed. (Affidavit of Plaintiff dated August 5, 1977, paragraph 5). The total purchase price of the parcel was \$700.00, which represented the fair market value of the property. (Affidavit of John Wunderli, (hereafter Wunderli Affidavit), dated January 6, 1978, paragraphs 3 and 14, Deposition of Plaintiff dated March 14, 1977, page 15, lines 1 through 4.) The Defendant-Respondent provided the Plaintiff in 1945 with an abstract of title, which abstract did not indicate the existence of any easement on the property in favor of the Defendant Union Pacific Railroad Company. (Affidavit of Plaintiff dated August 5, 1977, paragraph 10, Wunderli Affidavit dated January 6, 1978, paragraph 5.)

Following his purchase of said property, Plaintiff-Appellant mortgaged the property on several occasions for varying amounts of money. (Wunderli Affidavit dated January 6, 1978, paragraph 5.) The last said mortgage was given in 1965 to Dean Terry and Vilate Terry, his wife. (Wunderli Affidavit dated January 6, 1978, paragraph 10, 5.)

On August 25, 1916, the Defendant-Respondent had given an easement to the San Pedro, Los Angeles, and Salt Lake Railroad Company Corporation for purposes of a spur railroad track. (Wunderli Affidavit dated January 6, 1978, paragraph 6.) This easement was subsequently acquired by the

Defendant, Union Pacific Railroad Company. Because of an inadequate description of the easement in the original deed, the location of the easement is not ascertainable in the records of the Utah County Recorder's Office. (Wunderli Affidavit, dated January 6, 1978, paragraph 6.)

On September 16, 1956, Plaintiff-Appellant leased from the Los Angeles and Salt Lake Railroad a triangular piece of property adjoining the subject property on the south. There was attached to that lease as Exhibit A a plat showing the property leased. On that plat there is shown a spur track number 6 which parallels and bounds the east boundary line of the subject property. Shown to the west on the plat outline is a double line in the middle of which appear the words "spur track (abandoned)." Since September 16, 1946, up to the present time, Plaintiff-Appellant has been aware of the fact that there was an easement which was designated as abandoned by the railroad extending through the subject property. (Wunderli Affidavit dated January 6, 1978, paragraph 7.) Plaintiff had knowledge at the time of his purchase that there had been a spur track located on the property. (Wunderli Affidavit dated January 6, 1978, paragraph 11.)

Plaintiff-Appellant has never been evicted from the subject property by reason of the purported spur track easement in favor of the railroad. (Wunderli Affidavit dated January 6, 1978, paragraph 8.) In fact, in or about 1948, Plaintiff-Appellant caused a large building to be constructed directly over the purported easement. (Wunderli Affidavit, dated January

7.) The railroad at no time has ever complained or made any issue about Plaintiff-Appellant's use of the property, nor has it ever asserted any rights in connection with the spur track easement. (Wunderli Affidavit dated January 6, 1978, paragraph 9.)

In 1970 and 1971, Plaintiff-Appellant suffered a major setback in the operation of his business due to the theft of equipment. (Deposition of Plaintiff dated March 14, 1977, p. 32, lines 21 and 22.) This led to the failure of his business, and in the years 1971 through 1975, Plaintiff-Appellant had no income. (Deposition of Plaintiff dated March 14, 1977, p. 32 lines 12-20.)

Plaintiff-Appellant claims that on March 13, 1973, he learned of the purported railroad spur easement for the first time. (Plaintiff's Affidavit dated August 5, 1977, paragraph 6.) However, in Plaintiff's Affidavit, paragraph 13, Plaintiff-Appellant states of a conversation with Defendant's Mr. Bigler on May 6, 1971, with respect to the spur track easement. He entered into negotiations with the Defendant Union Pacific Railroad Company to obtain a quit claim deed for the easement upon his payment to the railroad of \$100.00. (Plaintiff's Affidavit dated August 5, 1977, paragraph 15), but this transaction was never completed. (Plaintiff's Affidavit dated August 5, 1977, paragraph 20.)

Due to the failure of his business, Plaintiff was unable to make the mortgage payments on the subject property (Wunderli Affidavit dated January

6, 1978, paragraph 12), and on March 10, 1975, Dean Terry and Vilate

Terry, holders of the mortgage, obtained a judgment and decree of foreclosure of the mortgage. The property was sold at public auction and the Plaintiff-Appellant failed to redeem the property. (Wunderli Affidavit dated January 6, 1978, paragraph 10.)

At no time prior to the filing of this action did Plaintiff-Appellant ask said Defendant-Respondent to remedy and secure a release of the easement. (Deposition of Plaintiff, dated March 14, 1977, p. 33 lines 12-24, p. 73 line 10 through p. 75 line 16; Wunderli Affidavit dated January 6, 1978, paragraph 13.) Instead, after Plaintiff-Appellant's mortgage was foreclosed for failure to make mortgage payments as required, he filed this action against the Defendant-Respondent to recover damages in excess of \$400,000.00 he allegedly suffered as a result of the abandoned easement. (Prayer of Amended Complaint.)

ARGUMENT

I. PLAINTIFF-APPELLANT'S CAUSE OF ACTION IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE IT IS FOR A LIABILITY CREATED BY THE STATUTES OF THIS STATE, AND THE THREE-YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 78-12-26, UTAH CODE ANNOTATED, 1953, AS AMENDED, APPLIES.

This is an action to charge Defendant-Respondent with liability for breach of the covenants of title. Covenants of title applicable in Utah are set forth in § 57-1-12, Utah Code Annotated, 1953, as amended, and accordingly, Plaintiff-Appellant's Cause of Action is for a liability created

by the statutes of this state. Section 78-12-26 (4), Utah Code Annotated, 1953, as amended, provides that

An action for a liability created by the statutes of this state, other than a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state . . .

must be brought within three years. Actions on covenants of title are not a "special case" in which a different statute of limitations is prescribed by statute, and the general provision set forth above should apply. Plaintiff-Appellant contends that the six-year statute of limitations for liabilities founded upon a written instrument should apply. Such a view overlooks the fact that the writing involved in this case does not set forth any of the specific warranties found in the statute. It merely contains a covenant that grantor "has not done or committed any act or thing whereby the said premises now are or at any time hereafter shall be impeached, charged, or encumbered in any manner whatsoever." (Special Warranty Deed from Defendant-Respondent to Plaintiff-Appellant dated June 8, 1945.) Only by referring to the statute may the five specific covenants referred to in Plaintiff-Appellant's brief be found. Plaintiff-Appellant's claim is founded on the statute, not on the writing, and the shorter statute of limitations should apply.

Although the Utah Supreme Court has applied the six-year statute of limitations to a case involving breach of covenants of title, there is no indication in that opinion that the issue of the applicable statute of

limitations was ever raised. Soderberg v. Holt, 86 Utah 485, 46 P 2d. 428 (1935). Since actions on covenants of title in Utah are grounded upon statutory provisions, it would appear that the three-year statute of limitations would be by its terms more applicable.

Viewing the evidence in the light most favorable to Plaintiff-Appellant, his own statement of the facts in his brief indicates that more than three years expired between March 13, 1973, the date Plaintiff-Appellant claims the cause of action arose, and November 11, 1976, the date he filed this lawsuit. Thus, Plaintiff-Appellant's cause of action is barred by the applicable statute of limitations even on his own statement of facts.

II. EVEN IF THE SIX-YEAR STATUTE OF LIMITATIONS APPLIES, PLAINTIFF-APPELLANT'S CAUSE OF ACTION IS BARRED BECAUSE MORE THAN SIX YEARS EXPIRED BETWEEN THE DATE ANY CAUSE OF ACTION ACCRUED IN THE PLAINTIFF-APPELLANT AND THE DATE THE ACTION THEREON WAS COMMENCED.

The material facts in this case are not disputed, and based upon the undisputed facts, the District Court properly held that as a matter of law Plaintiff-Appellant is not entitled to recover. The facts show that Plaintiff-Appellant's only cause of action arose at the time of the conveyance of the property, in 1945, and that this action is barred even by the six-year statute of limitations.

As the basis for his claim against the Defendant-Respondent,

Plaintiff-Appellant has alleged that the Defendant-Respondent "breached its

warranties to convey fee title to the Plaintiff." (Amended Complaint, paragraph 8.) He further alleges that Defendant-Respondent breached the "warranties of title and covenants expressed or implied in the Special Warranty Deed." (Amended Complaint, paragraph 20.) There is no clarification in the amended complaint as to what specific covenants Plaintiff-Appellant alleges were breached, so this brief will respond as if it had been alleged that Defendant-Respondent had breached all of the warranties expressed or implied in the Special Warranty Deed.

Section 57-1-12, Utah Code Annotated, 1953, as amended, sets forth the five statutory covenants that a properly executed Warranty Deed is deemed to include. Under this statute, grantor covenants as follows:

1. That he is lawfully seised of the premises,
2. That he has good right to convey the same,
3. That he guarantees the grantee, his heirs, and assigns the quiet possession thereof,
4. That the premises are free from all encumbrances, and
5. That the grantor, his heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs, and assigns against all lawful claims whatsoever.

A Special Warranty Deed includes each of these covenants, except that grantor only covenants that he himself has done nothing to breach them.

In analyzing a case in which a breach of any or all of these covenants is alleged, it is important to bear in mind that the law does not treat each of

these covenants the same, and the legal principles applicable to one

covenant may have no bearing upon another covenant. It is essential, in studying the case law regarding such covenants, to determine which of the covenants a case is dealing with so as to avoid the misapplication of important legal principles. For example, legal principles regarding the covenant of seisin should not necessarily be applied to the covenant of warranty.

In order to simplify the discussion, each of the covenants which Defendant-Respondent has allegedly breached will be discussed separately.

Covenant of Seisin.

The covenant of seisin is a covenant that grantor owns the estate or interest he purports to convey. It is breached if the grantor does not own the estate or interest he purports to convey. No actual eviction of grantee is required.

The majority rule, with which we are in accord, is that there is a breach of warranty when it is shown that the grantor did not own the land that he purported to convey by warranty deed description. The covenants involved are of seisin and of good right to convey the property which for the purposes considered in this case, are synonymous, and the breach thereof is made out by a showing that those rights did not exist in the grantor, and it is not necessary to show an actual eviction or threat thereof. Creason v. Peterson, 24 Utah 2d 305, 470 P 2d. 403 (1970). (Emphasis added.)

A breach of this covenant occurs at the time of conveyance, if at all, for the grantor either has seisin or he does not have seisin at the time he makes the covenant. Bernklau v. Stephens, 150 Colo. 187, 371 P. 2d 765,

The cause of action for breach of the covenant of seisin arises at the time the deed is given. Anderson v. Larson, 177 Minn. 606, 225 N.W. 902 (1929); Faller vs. Davis, 30 Okl. 56, 118 P. 382 (1911), cited with approval in Creason v. Peterson. Therefore, the statute of limitations starts running against the grantee in a case involving the covenant of seisin upon the date of conveyance. If Plaintiff-Appellant alleges that said Defendant breached the covenant of seisin, his claim is clearly barred under even the six-year statute of limitations.

It should be noted that Creason v. Peterson, which is cited by Plaintiff-Appellant in support of its position that an actual eviction need not be alleged to permit recovery for breach of the covenant of warranty, deals with a breach of the covenants of seisin and right to convey. The holding in Creason is not applicable to covenant of warranty cases. The opinion expressly states "The covenants involved are of seisin and of good right to convey the property." Although the opinion does use the word "warranty" in defining what constitutes a breach of the covenant of seisin, it appears that the court was using the word "warranty" as a synonym for the word "covenant." This becomes even more clear upon noting that it is the very next sentence that states that the covenants involved in that case were those of seisin and right to convey.

Covenant of Right to Convey.

This covenant is that grantor has the power to convey the property

described in the deed. It is very similar to the covenant of seisin and the

Utah Supreme Court treated it as synonymous with the covenant of seisin in the case of Creason v. Peterson. Accordingly, this covenant was breached, if at all, at the time of the conveyance, and any claim Plaintiff-Appellant has thereon is barred by the statute of limitations.

Covenant against Encumbrances.

This covenant is one against encumbrances upon the property, such as liens, mortgages, and easements. The existence of an encumbrance upon the property is a breach of this covenant. The primary question before the courts regarding this covenant has been, When does a cause of action accrue for breach of the covenant against encumbrances? Soderberg v. Holt, supra. The Soderberg case sets forth a detailed discussion of the various judicial positions on this issue, which is summarized herein. The opinion states that traditionally the covenant against encumbrances was treated similarly to those of seisin and right to convey. A cause of action for breach of the covenant against encumbrances arose at the time of the conveyance, for the reason that either there was an encumbrance at the time of conveyance or there was not. Later, some jurisdictions revised this rule, holding that the cause of action did not arise until the grantee suffered damages as a result of the encumbrance. This revised position was intended to protect grantees who were not made aware of the encumbrance until long after the statute of limitations had expired. These courts viewed the covenant solely as one of indemnity, giving the grantee the right

to recover from the grantor any sums grantee had to pay as a result of the

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encumbrance.

This revised rule corrected an injustice, in that parties who were required to extinguish encumbrances such as liens and mortgages were allowed to be indemnified by their grantor at the time they were really damaged, that is, upon their being damnified. Unfortunately, this revised rule created a new injustice, in that it virtually denied grantors the protection of the statute of limitations in cases where the encumbrance was not a monetary charge on the land that could be extinguished, but was a permanent burden on the title, such as an easement. Such encumbrances were generally not capable of being removed by payment of a charge, but were of a type that permanently reduced the value of the property, with the loss, if any, occurring at the time of conveyance and not later, as in the case of monetary charges.

Judge Cooley in Post v. Campau, 42 Mich. 90, 3 N.W. 272, 275 (1879) drew this distinction between the two types of encumbrances, creating a new rule, and the Utah Supreme Court in Soderberg cited his opinion with strong approval and adopted his view. The Utah court felt that where an encumbrance not involving a money charge exists, the covenant is breached and the cause of action arises at the time of conveyance, because that is the best time to determine the damage suffered by the grantee, consisting of loss in value of the property. The protection of the statute of limitations is accorded to the grantor commencing with the date of the conveyance.

Explaining its position, the Utah Court held:

In a very able opinion, Mr. Justice Cooley drew a distinction between encumbrances which were permanent and which were burdens upon the title, such as an easement . . . and those encumbrances, such as liens, which were capable of being removed at the option of the covenantee. The former kind, Judge Cooley suggested, permanently reduced the value of the title conveyed and thus could be ascertained as much at the time of the conveyance as at any future time, and that therefore it was reasonable to hold that a covenant against them was broken at once and finally, because the covenantee could proceed at once to recover full damages . . . "It is only by thus distinguishing between encumbrances that the covenant can have reasonable effect in all cases . . ." We believe that the logical fabric and the law will be better maintained and yet justice be done by holding that a covenant against encumbrances is, in effect, a covenant to indemnify where the encumbrance is a charge or lien against the land which can be extinguished by payment. Thus the statute can be held to begin to run only when the grantee is damnified. (Emphasis added.)

Later in the opinion, the court discusses the similarity of circumstances in cases where the covenant of seisin is breached and in cases where an encumbrance exists which is not a money charge on the land. In each situation a nondischargeable encumbrance exists which permanently affects the title. The court states further "in such cases there is no reason why the statute [of limitations] should not be set in motion immediately when the covenant is broken, because the damages for the wrong may be then as completely and fully adjudged as at any other time."

The Soderberg rule remains the law in Utah. Thus in cases involving a money charge on property, the statute of limitations does not commence

like the one at bar, where the encumbrance is an easement, not involving a money charge, the statute of limitations commences at the time of conveyance. If an action is timely commenced, the Plaintiff may recover the difference in value between the property with the encumbrance and without the encumbrance. If the action is not timely commenced, as occurred in this case, it is barred. Plaintiff-Appellant's citation of Soderberg as holding that the covenant against encumbrances is solely a covenant to indemnify misstates the court's holding and overlooks the above distinction between types of encumbrances. The language in Soderberg stating that the statute of limitations begins to run only when the grantee is damnified expressly applies only "where the encumbrance is a charge or lien against the land which can be extinguished by payment." No such monetary encumbrance existed in our case.

Also, since the deed to the easement was recorded in 1916, the public records imparted constructive notice to the Plaintiff-Appellant of the existence of the easement, and it becomes even more just to hold that his cause of action arose at the time of the conveyance. Ruthrauff v. Silver King Western Min. & Mill. Co., 95 Utah 279, 80 P 2d 338 (1938). The statute of limitations commenced in 1945, and expired long before Plaintiff-Appellant filed suit. Any claim of Plaintiff-Appellant based on the covenant against encumbrances is barred, and the District Court held properly in granting summary judgment for the Defendant-Respondent.

Covenants of Quiet Enjoyment and Warranty.

The covenant for quiet enjoyment is that grantee will not be disturbed in his possession or enjoyment of the property by a third party's lawful claim of title. The covenant of warranty is that grantor guarantees the soundness of title, and agrees to defend on behalf of the grantee any paramount claims existing at the date of conveyance. For all practical purposes, these two covenants amount to the same thing, and because the same rules apply to each, they are discussed here together. East Canyon Land and Stock Company vs. Davis and Weber Counties Canal Company, 65 Utah 560, 238 P. 280 (1925); Van Cott v. Jacklin, 63 Utah 412, 226 P. 460 (1924). It is true that these covenants are not necessarily breached at the time of conveyance. It is also true that these covenants run with the land, although this does not become important in this case because there have been no subsequent grantees; the original covenantors are the parties to this suit.

The important point with respect to these covenants in this case is that even considering the evidence in the light most favorable to Plaintiff-Appellant, these covenants were not breached by the Defendant-Respondent. Therefore, no cause of action ever arose for Plaintiff-Appellant on these two covenants.

The covenants for quiet enjoyment and warranty are breached, and a cause of action accrues in the grantee, if the grantee is (1) evicted (2) by one having paramount title.

The general rule is to the effect that where one seeks

to recover for a breach of the covenants of warranty of title, he must allege an eviction by one having paramount or better title. East Canyon Land & Stock Company v. Davis & Weber Counties Canal Company, supra.

The Utah Supreme Court has further stated that the covenant of warranty is a "warranty against eviction only." VanCott v. Jacklin, supra, citing Tallmadge v. Wallis, 25 Wend. (N.Y.) 115. Therefore, as a general rule, Utah law requires that there be an eviction of a grantee by someone having paramount title before a cause of action arises for breach of these covenants.

It seems implicit in the above statement of the rule that, at least in the case of Special Warranty Deeds, that paramount title in the evicting party must have been in existence at the time of conveyance to the grantee, for two reasons. First, the grantor in a Special Warranty Deed covenants only that he will warrant and defend his grantee's title and quiet enjoyment against the lawful claims that were created by some act of his. He does not promise to protect against lawful claims arising subsequent to his conveyance. Second, it would be inherently unjust to require a grantor to protect his grantee against claims arising as a result of grantee's actions and not through any acts of the grantor, after grantor had conveyed the property. Accordingly, a grantee has no cause of action against his grantor on the covenants of warranty and quiet enjoyment if he either is not evicted from the property, or if he is evicted but by someone claiming paramount title when he claims after the conveyance of the property. This view is

supported in a case cited in Plaintiff-Appellant's brief, which states that:

No cause of action arises upon the covenant of warranty . . . until after eviction, either actual or constructive, by one having an adverse or paramount title which existed when the covenant was made.

Wilder v. Wilhite, 190 Kan. 564, 376 P.2d 797 (1962).

In the present case, Plaintiff-Appellant has no cause of action on the covenants of warranty or quiet enjoyment because he was never evicted from the property. He alleges in paragraph 10 of his Amended Complaint that he was evicted "due to the fact that he was prevented from either mortgaging or selling said property, and that said property was lost in a foreclosure action." This allegation does not state a valid cause of action, as the District Court properly held. The Plaintiff-Appellant was never evicted from the subject property. Rather, his interest was foreclosed by a third party to whom he had mortgaged the property in 1963, eighteen years after the conveyance of the property to him. The property was sold to satisfy the judgment of foreclosure, and Plaintiff-Appellant failed to redeem the property after the judgment sale. He was not evicted.

Furthermore, even if this court should hold that foreclosure of a mortgage and subsequent sale of the mortgaged property constitutes an eviction by the mortgagee of the mortgagor, Plaintiff-Appellant still has no cause of action on the covenants of warranty and quiet enjoyment against Defendant-Respondent. This is because he was not "evicted" by someone holding paramount title who held such title at the time of conveyance. If

rights as easement holder and had required Plaintiff-Appellant to remove his building from the right of way, Plaintiff-Appellant might have a colorable claim. Even at that, such an "eviction" would only be partial. The Plaintiff-Appellant doesn't allege this, and the facts show that the railroad had for all intents and purposes abandoned the easement. Plaintiff-Appellant alleges only that he was foreclosed upon by his own mortgagee. Defendant-Respondent had nothing to do with the creation of the mortgage and should not be required to be responsible for Plaintiff-Appellant's failure to keep up his mortgage payments. In cases involving an alleged breach of the covenant against encumbrances, Utah law clearly provides that a grantor cannot recover damages for breach of the covenant by his grantors unless those damages were in fact caused by the breach of that covenant. Damages resulting from some other cause are not recoverable. Pacific Bond & Mortgage Co. v. Rohn, 101 Utah 335, 121 P 2d 635 (1942). It would appear that the same rule should apply in cases involving alleged breaches of the covenants of warrants and of quiet enjoyment.

The only effect that Plaintiff-Appellant alleges directly resulted from the existence of the easement was that he was unable to sell or mortgage the property. Even if this were true, it does not allege a breach of the covenants of warranty or quiet enjoyment. The law does not require a grantor to covenant in a Special Warranty deed that his grantee will later be able to sell the property. It only requires him to covenant that the grantee will not be evicted from the property by a paramount claim. VanCott v.

Jacklin, supra, East Canyon Land & Stock Company v. David & Weber Counties Canal Company, supra. The cause of the Plaintiff-Appellant's loss through foreclosure of the property was his failure to make the required mortgage payments. The foreclosure was not caused by the existence of the easement. Since Plaintiff-Appellant has not alleged and the facts before the Court do not show an eviction of the Plaintiff-Appellant by one holding paramount title, no cause of action for breach of these warranties ever arose in the Plaintiff-Appellant.

III. THE FOURTH DISTRICT COURT PROPERLY DISMISSED THE ACTION AS PLAINTIFF WAS NEVER EVICTED.

Plaintiff-Appellant states in his brief that Utah law does not require an allegation of actual eviction to state a cause of action for breach of these covenants. He cites the case of East Canyon Land & Stock Company v. David & Weber Counties Canal Company, and selectively quotes language in the opinion to support his view. The East Canyon case is clearly distinguished from this action and the language quoted is inapplicable to the facts of this case. In East Canyon, the grantor deeded property by mesne conveyances to the ultimate grantee by warranty deed. It was discovered that the grantor had not owned the land, but that title thereto was in the sovereign, the United States. Plaintiff sued for breach of the covenant of warranty, but did not allege an actual eviction. Defendant demurred to the complaint. The Court first clearly stated, as was discussed above, that the

in order to state a valid cause of action for breach of the covenants of warrants and quiet enjoyment. It then cited two main exceptions to the rule. First, where title is in the sovereign (as occurred in that case), an actual eviction need not be alleged. The language quoted by Plaintiff-Appellant is the language of this exception to the general rule. Plaintiff-Appellant's statement on page 9 of his brief that the language he quotes "sets forth what allegations are sufficient in a breach of covenants action," misstates the law and makes the exception into the general rule. This exception, on its facts, does not apply in the present case, where paramount title is not in the sovereign.

The second exception is that where a paramount title is asserted so that grantee must either yield to it by leasing or purchasing the land, or else be evicted, no actual eviction need be pleaded if the grantee chose to purchase or lease the property rather than be evicted. This exception does not apply to the present case either, because the purported paramount title holder, the Defendant railroad company, never sought to "evict" the Plaintiff-Appellant, and Plaintiff-Appellant never was put in the position of choosing between eviction or paying off the railroad.

Plaintiff-Appellant also cites the case of Creason vs. Peterson, supra, in support of his claim that no actual eviction was required. As was discussed above, Creason dealt expressly with the covenants of seisin and right to convey, where eviction is not required. Its language is not applicable to cases involving breach of the covenant of warranty.

Plaintiff-Appellant further cites the Kansas case of Wilder vs. Wilhite, in support of his claim that no actual eviction was required. The Wilder case does not support Plaintiff-Appellant's argument. That case states with clarity, in language quoted above, the rule that an eviction is required to support a cause of action for breach of the covenant of warranty. No actual eviction was alleged in Wilder, but the Petition did allege that grantee had been required to engage in "extensive litigation" with a third party who held paramount title. The court felt that this allegation was sufficient to allege a constructive eviction and withstand a demurrer. The case at bar is distinguishable on its facts from Wilder, because the only purported holder of paramount title, the railroad company, has made no issue of the easement and has never sought to enforce it against Plaintiff-Appellant. There has been no litigation whatsoever between Plaintiff-Appellant and the railroad over the railroad's right to the easement. It should be noted that the court liberally construed the Plaintiff's pleading in Wilder, because its sufficiency had never been challenged by the Defendant on motion, and this fact affected the court's decision. In the present case, Plaintiff-Appellant has filed both a Complaint and an Amended Complaint, neither of which state a cause of action, and he should not be entitled to any such liberal treatment. This view is supported in Faller v. Davis, supra, cited approvingly in Creason v. Peterson.

Under applicable Utah Law, therefore, an eviction of Plaintiff-

cause of action could arise in Plaintiff-Appellant for breach of the covenants of warranty and quiet enjoyment.

CONCLUSION

Because any claim that Plaintiff-Appellant may have had for breach of the covenants of seisin, right to convey, or against encumbrances is barred by even the six-year Statute of Limitations, and because no cause of action ever arose in the Plaintiff-Appellant for the breach of the covenants of warranty and quiet enjoyment, the District Court ruled properly in dismissing the Complaint. The Defendant-Respondent respectfully requests that the decision of the District Court be affirmed on this appeal.

Respectively Submitted

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